Supreme Court, U.S.
FILED
DEC 17 1993
OFFICE OF THE CLERK

(2)

No. 93-795

In The

Supreme Court of the United States

October Term, 1993

BLUE CROSS/BLUE SHIELD OF CONNECTICUT,

Petitioner,

vs.

INTER VALLEY HEALTH PLAN,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal Fourth Appellate District, Division Three

RESPONDENT'S BRIEF IN OPPOSITION

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16 pp

QUESTIONS PRESENTED

I. WHETHER A CALIFORNIA COURT, IN THE ABSENCE OF ANY FEDERAL PRECEDENT SUPPLYING THE APPROPRIATE RULE UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, 29 U.S.C. § 1001, et seq. ("ERISA"), MAY ADOPT A COORDINATION OF BENEFITS RULE BASED ON THE NATIONAL MODEL REGULATION FOLLOWED BY THE MAJORITY OF STATES.

II. WHETHER THE DECISION OF THE CALIFORNIA COURT OF APPEAL IMPAIRS UNIFORMITY IN THE RESOLUTION OF COORDINATION OF BENEFITS QUESTIONS DESPITE THAT THERE IS NO EXISTING FEDERAL PRECEDENT THAT APPLIES TO THE FACTS OF THIS CASE.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Inter Valley Health Plan[1] respectfully prays that Petitioner Blue Cross/Blue Shield of Connecticut's Petition for Writ of Certiorari be denied.

[1] Respondent has no parent or subsidiary companies to be listed pursuant to Supreme Court Rule 29.1.

STATUTES AND REGULATIONS INVOLVED

10 Cal. Code Reg. § 1300.67.13(b)(4)(B)

> (B) Except for cases of a person for whom claim is made as a dependent child whose parents are separated or divorced, the benefits of a Plan which covers the person on whose expenses claim is based as a dependent of a person whose date of birth, excluding year of birth, occurs earlier in a calendar year, shall be determined before the benefits of a Plan which covers such person as a dependent of a person whose date of birth, excluding year of birth, occurs later in a calendar year. If either Plan does not have the provisions of this paragraph regarding dependents, which results either in each Plan determining its benefits before the other or in each Plan determining its benefits after the other, the provisions of this paragraph shall not apply, and the rule set forth in the Plan which does not have the provisions of this paragraph shall determine the order of the benefits.

NAIC Coordination of Benefits Model Regulation § 5(2)(a-c)

(2) Dependent Child/Parents Not Separated or Divorced

> The rules for the order of benefits for a dependent child when the parents are not separated or divorced are as follows:
>
> (a) The benefits of the plan of the parent whose birthday falls earlier in a year are

determined before those of the plan of the parent whose birthday falls later in that year;

(b) If both parents have the same birthday, the benefits of the plan which covered the parent longer are determined before those of the plan which covered the other parent for a shorter period of time;

(c) The word "birthday" refers only to month and day in a calendar year, not the year in which the person was born.

NAIC Coordination of Benefits Model Regulation § 5(3)(a-d)

(3) Dependent Child/Separated or Divorced Parents

If two or more plans cover a person as a dependent child of divorced or separated parents, benefits for the child are determined in this order:

(a) First, the plan of the parent with custody of the child;

(b) Then, the plan of the spouse of the parent with custody of the child; and

(c) Finally, the plan of the parent not having custody of the child.

(d) If the specific terms of a court decree state that one of the parents is responsible for the health care expenses of the child, and the entity obligated to pay or provide the benefits of the plan of that parent has actual knowledge of those terms, the benefits of that plan are determined first. The

> plan of the other parent shall be the Secondary Plan. This paragraph does not apply with respect to any Claim Determination Period or Plan Year during which any benefits are actually paid or provided before the entity has that actual knowledge.

STATEMENT OF THE CASE

A. Factual Background.

After paying for the cost of Anjanette Farace's bone marrow transplant pursuant to its insuring agreement covering Anjanette's mother and her dependents, Respondent Inter Valley Health Plan learned that a divorce decree dissolving the marriage of Anjanette's parents made her father responsible for Anjanette's medical expenses. In accordance with California coordination of benefits law, which would otherwise apply in the absence of preemption, Respondent requested that Petitioner Blue Cross/Blue Shield of Connecticut pay the expenses pursuant to its health care administration agreement with the father's employer. Respondent complied, resulting in duplicative payments, and this action ensued to recover the excess payments made to the health care provider.

B. Procedural History.

At trial, Respondent contended that the court should apply the applicable California coordination of benefits regulation and follow the terms of the divorce decree,

which would have made the father's plan primary. Petitioner argued, on the other hand, that the California regulation was preempted by ERISA and that the court should apply the "rule of Solomon" adopted in *Winstead v. Indiana Insurance Company*, 855 F.2d 430 (7th Cir. 1988), *cert. denied*, 488 U.S. 1030, 109 S. Ct. 839, 102 L. Ed. 2d 971 (1989), and apportion the liability on a pro-rata basis between the two insurers. Alternatively, both parties argued that the court should look to the respective plan documents to resolve the dispute, although each party asserted a different interpretation of the documents.

Ultimately, the trial court rejected the arguments of both parties and held that the applicable law was the "birthday rule" espoused in the Ninth Circuit Court of Appeals' decision in *PM Group Life Insurance Co. v. Western Growers Assurance Trust*, 953 F.2d 543 (9th Cir. 1992), despite that *PM Group Life* involved coordinating benefits between the insurers of a married couple and, therefore, did not present the same issues presented by the facts of this case, in particular the divorce decree making the father's plan primary.

The Court of Appeal reversed. It held that the birthday rule followed in *PM Group Life* does not apply to the facts of this case and that the considerations that lead the court in *PM Group Life* to apply the birthday rule were not present. Further, the Court of Appeal held that the majority of states apply a different order of benefits determination where the parents are separated or divorced and that effect should be given to the divorce decree under the majority rule.

SUMMARY OF ARGUMENT

The California Court of Appeal did not disregard federal court of appeal precedent, but expressly and correctly decided that the available federal common law does not apply to the unique facts of this case. Moreover, the California Court of Appeal opinion does not impair uniformity because it follows the rule that would be applied in the majority of states under the circumstances of this case, whereas none of the existing federal authority is on point.

REASONS WHY THE WRIT SHOULD BE DENIED

I. WHETHER A CALIFORNIA COURT, IN THE ABSENCE OF ANY FEDERAL PRECEDENT SUPPLYING THE APPROPRIATE RULE UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, 29 U.S.C. § 1001, et seq. ("ERISA"), MAY ADOPT A COORDINATION OF BENEFITS RULE BASED ON THE NATIONAL MODEL REGULATION FOLLOWED BY THE MAJORITY OF STATES.

The Petition for Writ of Certiorari incorrectly states that the California Court of Appeal disregarded existing federal common law in deciding this case. In fact, the Court of Appeal expressly acknowledged and analyzed the opinions of the various federal courts of appeal that have fashioned coordination of benefits rules after holding that ERISA preempts state coordination of benefits regulations. *Inter Valley Health Plan v. Blue Cross/Blue Shield of Connecticut*, 16 Cal. App. 4th 60, 19 Cal. Rptr. 2d 782, 786 (1993). In a well-reasoned opinion, however, the Court of Appeal held that none of the existing federal precedent applies to the facts of this case. *Id.*

Contrary to Petitioner's representations, the Court of Appeal's analysis began with the only available precedent from the Ninth Circuit Court of Appeals, *PM Group Life Insurance Co. v. Western Growers Assurance Trust*, 953 F.2d 543 (9th Cir. 1992). The Court of Appeal stated: "At the outset, we must reject the notion that because *PM Group Life* used the birthday rule, we must apply it in the circumstances of this case." 19 Cal. Rptr. 2d at 786. The court explained that while the birthday rule is a workable solution for resolving coordination of benefits disputes between insurers of non-divorced couples, it makes little sense where the parents are divorced. As the court observed:

> In essence, a married couple is a single economic unit. Accordingly, there is a reason to draw an arbitrary line as to which health insurer has primary responsibility as between a married couple. The birthday rule, in such a context, is the analytic equivalent of flipping a coin. This is obviously not the case with a divorced couple, who are two economic units. And, given the economic independence of a divorced couple, it makes far more sense for primary responsibility to follow the relationship which the parties themselves structure into their divorce judgment.
>
> Accordingly, we do not believe that *PM Group Life's* birthday rule controls this case. *Inter Valley*, 19 Cal. Rptr. 2d at 788.

As the foregoing excerpt from the Court of Appeal's opinion makes clear, rather than "disregarding" the available federal precedent as Petitioner contends, the Court of Appeal expressly endorsed the reasoning of *PM Group*

Life as applied to the facts of that case. Nevertheless, neither the Ninth Circuit Court of Appeals' opinion in *PM Group Life*, nor the decisions of the Sixth and Seventh Circuit Courts of Appeals supply a coordination of benefits rule for use in cases where the parents of the insured dependent are divorced. *See Auto Club Insurance Association v. Health & Welfare Plans, Inc.*, 961 F.2d 588 (6th Cir. 1992); *Winstead v. Indiana Insurance Co.*, 855 F.2d 430 (7th Cir. 1988), *cert. denied*, 488 U.S. 1030, 109 S. Ct. 839, 102 L. Ed. 2d 971 (1989).

Moreover, as widely accepted as the birthday rule is in cases where the parents are married, it is universally *not* the rule that is followed where the parents are divorced or separated. Both the Model Regulation adopted in the majority of states and the California coordination of benefits regulation provide a different order of benefits determination where the parents are divorced and specifically take into account the provisions of any divorce decree allocating financial responsibility for medical expenses to one of the parents. *See* NAIC Group Coordination of Benefits Model Regulation ("Model Regulation"), § 5(B)(3)(d); California Code of Regulations, Title 10, § 1300.67.13(b)(4)(E). If a divorce decree containing such an allocation exists, the decree must be followed. *Id.* Moreover, even in the absence of a divorce decree allocating responsibility for medical expenses, the majority rule is to dispense with the birthday rule where the parents are divorced and, instead, apply an analysis based on custody. *See* Model Regulation § 5(B)(3)(a-c); California Code of Regulations, Title 10, § 1300.67.13(b)(4)(C) and § 1300.67.13(b)(4)(D).

Thus, while Petitioner's statement that the majority of courts follow the birthday rule is technically correct, it

is not correct in the context of this case. For the same reasons, Petitioner's statement that the Court of Appeal disregarded federal common law is wrong. Respondent is aware of no existing federal common law that addresses the unique circumstances presented by this case. Moreover, given the provisions of the Model Regulation followed in a majority of the states, there is every reason to believe that a federal court of appeal confronted with the facts presented by this case would reach the same result reached by the Court of Appeal.

II. WHETHER THE DECISION OF THE CALIFORNIA COURT OF APPEAL IMPAIRS UNIFORMITY IN THE RESOLUTION OF COORDINATION OF BENEFITS QUESTIONS DESPITE THAT THERE IS NO EXISTING FEDERAL PRECEDENT THAT APPLIES TO THE FACTS OF THIS CASE.

As set forth above, the rule that the California Court of Appeal applied to this coordination of benefits dispute is based on the national Model Regulation, which also served as the basis for the California regulation. *See PM Group Life*, 953 F.2d at 547 (observing that "California has adopted almost verbatim a uniform rule promulgated by the NAIC"). Thus, while Petitioner complains that the Court of Appeal was exhibiting a preference for local regulations over uniform rules of general application, nothing could be further from the truth. As the Court of Appeal observed:

> The basic order set out in the California regulations follows the sequence recommenced by the Advisory Committee to the National Association of Insurance Commissioners (NAIC). . . .

> That is, if the parents are not divorced or separated, the birthday rule should be used. If the parents are divorced or separated, the order of health insurers is first that of the parent with custody, then the spouse of the parent with custody, then the noncustodial parent, except where 'the specific terms of a court decree state that one of the parents is responsible for the child's health care expenses and the insurer or other entity obligated to pay or provide the benefits of that parent's plan has actual knowledge of those terms.' *Inter Valley*, 19 Cal. Rptr. 2d at 787.

The Court of Appeal concluded that given the gap left by ERISA, which provides no guidance on coordinating benefits, "the gap should be supplied by the state regulations, particularly where, as here, those regulations follow the national pattern." 19 Cal. Rptr. 2d at 788. Based on the Model Regulation, the Court of Appeal concluded that "because the instant case is one where the parents were divorced, the reason which prompted the Ninth Circuit to depart from the California regulations is not present here." *Id.* at 787.[2]

For this reason, Petitioner's argument that insurers in California will not know whether to follow the holding of *PM Group Life* or *Inter Valley* is analytically flawed. The clear mandate from the Court of Appeal is that *PM Group Life* should be followed in cases where the parents are still married and not separated, while the holding of *Inter*

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[2] Further, the Court of Appeal found that the regulations at issue here "do not have the self-contradictory element that discouraged the court in *PM Group Life* from following the law of the forum state." 19 Cal. Rptr. 2d at 787, citing *PM Group Life*, 953 F.2d at 547, n. 4.

Valley should be applied where the parents are divorced or separated. Both holdings follow the majority rule for their particular facts as set forth in the Model Regulation and, thus, both promote national uniformity.

Significantly, the Ninth Circuit Court of Appeals in *PM Group Life* expressly acknowledged that the birthday rule would not apply to all situations and, in that case, suggested that the rule to be applied should be borrowed from the NAIC Model Regulation. 953 F.2d at 548, n. 7.[3] As a result, it is reasonable to expect that the Ninth Circuit would limit its holding in *PM Group Life* to its particular facts and would decline to follow it if presented with a coordination of benefits case involving divorced parents, particularly since the Model Regulation also departs from the birthday rule in those circumstances.

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[3] Ironically, while Petitioner complains that the Court of Appeal's analysis started and ended with the California regulation that the court held preempted under ERISA, the same could be said of the analysis followed in *PM Group Life*. The Ninth Circuit began by holding that the California regulation's birthday rule was preempted and then concluded that the birthday rule should be applied under the guise of federal common law since it comported with the national pattern. Likewise, the California Court of Appeal held that the rule it applied in this case comported with the "national pattern". 19 Cal. Rptr. 2d at 788.

CONCLUSION

The California Court of Appeal properly applied the majority rule set forth in the Model Regulation for coordinating benefits in the circumstances of this case, after first holding that ERISA preempts the state coordination of benefits regulation and that the scant federal common law that exists in this area is not on point. The court considered and distinguished existing federal common law and reached a result that comports with the majority rule and, thus, likely arrived at the same result that would be reached by any state or federal court confronted with the issues presented by this case. As a result, the Court of Appeal's decision does not offend principles of uniformity or depart from existing federal common law.

Dated: December 17, 1993

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